

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1239 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

NAFISH @ GUDDU ASGARKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR UR BHATT, APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 29/04/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the order of detention dated 28th October 1997, passed by the Police Commissioner for the City of Surat, invoking his powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short, 'the Act'), pursuant to which, the petitioner is arrested and at present, kept under detention.

2. The facts necessary for appreciating the rival contentions may be stated. The Police Commissioner for

the City of Surat, came to know in the course of the performance of his duties, that the petitioner was a head strong person and by his subversive and nefarious activities, he was terrorising the people, as a result, his activities were the challenge to the maintenance of the public order. After inquisition, he came to know that two complaints were filed against the petitioner; one with Varachha Road Police Station and another in Mahidhar Pura Police Station - Surat. As alleged in the complaint with Varachha Road Police Station, the petitioner giving knife blows, committed the offences punishable under Sections 324, 452, 504, 506 Part II read with Section 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. As alleged in the other complaint lodged with Mahidhar Pura Police Station, the petitioner committed the offence of murder by giving knife blows and also committed other wrongs becoming a member of unlawful assembly and made himself liable to be tried for the offences punishable under Sections 143, 147, 148, 302 and 364 of the Indian Penal Code and Section 135 of the Bombay Police Act. The Police Commissioner, therefore, decided to have a detailed investigation so that proper remedial measures could be taken and the people who were afraid of the petitioner because of his violent attack and subversive activities could be made free, and the public order could effectively be maintained. He, therefore, decided to record the statements of some of the persons, but no one was willing to give the statement because every one was feeling insecured and worrying about his safety. After great persuasion and that too when assurance was given that their identity would not be disclosed, some of the persons showed their willingness to give the statements. After perusing the statements, the Police Commissioner was satisfied that whatever information he was having was true. The petitioner was a dangerous person within the meaning of the Act because he had indulged in several criminal and other nefarious activities. He was harassing the people, extorting money by using force, and ogling women and girls passing by the road. He, by force caused the people bend his way and succumb to his unjust demands and commands. He who made an attempt to challenge his act, was brutally dealt with and had to face dire consequences. He used to, putting shopkeepers and larry gallawalas in instant fear of death or injury, get his ill-will satisfied. Being helpless the shopkeepers used to close down the shutters and those having larry gallas used to leave the place. Many time public place wore desert-look because of wrongs being done in succession, and people because of fear of violence, had feeling helpless, thought it wise to suffer

miseries and woes rather than to complain. The Police Commissioner then found that such nefarious activities of the petitioner terrorising the people were going berserk and his anti-activities were required to be curbed any how. After cogitation, the Police Commissioner found that any stern action if taken under the general law will yield no result and the only way out was to pass the impugned order and detain the petitioner. In the result, the order came to be passed and the petitioner is kept under detention.

3. The impugned order is challenged on several grounds. At the time of hearing, both the learned Advocates tapered off their submissions confining to the only point, namely, exercise of privilege under Section 9(2) of the Act. According to the learned Advocate representing the petitioner, the particulars about the witnesses were suppressed without just cause, the same ought to have been furnished to the petitioner so as to make effective representation. No doubt, under Section 9(2) of the Act, it is open to the authority to exercise the privilege not to disclose the particulars, but the privilege has to be exercised judiciously and not arbitrary or perversely. Without knowing the source, it was difficult for the petitioner to represent and submit that the statements recorded were not reliable. When the right to make effective representation is jeopardised, the continued detention may be held to be illegal.

4. In reply to such contention, learned APP Mr. Bhatt has submitted that the Police Commissioner perusing, and studying every material placed before him and applying the mind, reached the conclusion that the privilege was required to be exercised in the public interest, namely, to protect the lives of the witnesses because any retaliatory action from the petitioner was not unknown. The privilege exercised is, therefore, just and proper and the order calls for no interference.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether

the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina,

W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind, filing affidavit. The contention of Mr. Bhatt, learned APP that the authority considered all the materials and considered other registered and unregistered offences committed by the detenu, and then was subjectively and independently satisfied that the fear expressed by the witnesses qua disclosure of their names, addresses and occupation was not illbased but it required anxious consideration, and to protect their safety, the particulars about witnesses were required to be suppressed cannot be accepted because the affidavit is not filed. Further, what appears from the impugned order is that the authority entrusted the task of inquiry to his subordinate officer, and without application of mind mechanically accepted the report. The subjective satisfaction is therefore vitiated. The continued detention is therefore illegal as the privilege is not rightly exercised. With the result the right of the petitioner to make effective representation for want of particulars withheld is jeopardised, he could not get the chance to point out that the statements were not reliable. The order therefore cannot be maintained. 7. On another ground also, the detention order is not tenable at law. It is made crystal clear by the Appex Court in the case of Pradeep Nilkanth Paturkar Vs. S. Ramamurthi and others, AIR 1994 SC 656 that if the detention order is passed after unjust delay from the last offence registered or the statements of the witnesses recorded, the order of detention cannot be maintained. In the case before Supreme Court, about five months and eight days after the last registration of the offence and four months from the statement which came to be recorded, the detention order was passed, and so on the ground of delay, that detention order was quashed and the detenu was ordered to be set at liberty. In the case on hand, as per the statement before me, the last complaint came to be registered on 13th October, 1996 and thereafter impugned order came to be passed on 19th July, 1997. The delay is not explained filing affidavit. In such cases preventive measures are required to be taken at the earliest, and if there is avoidable delay, it would certainly negative the necessity of detention.

When delay is not explained, the order passed about nine months after the last complaint came to be recorded cannot be maintained; it must be held to be illegal.

8. For the aforesaid reasons, this petition is allowed. The order of detention passed on 28th October 1997 by the Police Commissioner, Surat City, is hereby quashed and set aside. The petitioner-detenu is ordered to be set at liberty forth with, if not required in any other case. Rule is accordingly made absolute.

sreeram.